84-1054

CASE NO.

In The Supreme Court of the United States

OCTOBER TERM, 1984

PUBLIC UTILITIES COMMISSION OF OHIO, ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

ROBERT S. TONGREN
Assistant Attorney General
Counsel of Record

MARTIN J. MARZ
MARY R. BRANDT
Assistant Attorneys General

Office of the Ohio Attorney General
Public Utilities Section
180 East Broad Street
Columbus, Ohio 43215
Telephone (614) 466-4396

Attorneys for Petitioner
The Public Utilities Commission of Ohio

WILLIAM A. SPRATLEY
Consumers' Counsel
RICHARD P. ROSENBERRY
JANINE L. MIGDEN
LAWRENCE E. BARTH

ASSOCIATE CONSUMERS' COUNSEL

137 East State Street
Columbus, Ohio 43215
Telephone: (614) 466-9539

Attorneys for Ohio Office of Consumers' Counsel

QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit erred in concluding that the Federal Communications Commission may preempt the right of the several States to regulate depreciation methodology for the purpose of intrastate ratemaking.

LIST OF PARTIES

People of the State of California and the Public Utilities Commission of the State of California
Virginia State Corporation Commission
Federal Communications Commission and United States of America
North American Telephone Company
Florida Public Service Commission
State of Michigan and Michigan Public Service Commission
Department of Public Utility Control of the State of Connecticut
National Association of Regulatory Utility Commissioners
Southern Pacific Communications Company
Public Service Commission of the District of Columbia
Public Utilities Commission of Ohio
Arkansas Public Service Commission
Kansas State Corporation Commission
GTE Service Corporation
Public Service Commission of Wyoming
Continental Telecom Inc.
Washington Utilities and Transportation Commission
United Telephone System, Inc.
Department of Public Service of the State of Minnesota
Arizona Corporation Commission
Cincinnati Bell Inc.
Citizens of the State of Florida, Office of Public Counsel
National Association of State Utility Consumer Advocates
Consumer Advocate of South Carolina
Office of Consumers' Counsel for the State of Ohio
Iowa State Commerce Commission
Public Service Commission of Wisconsin
Public Service Commission of West Virginia
New York State Department of Public Service
The Bell Telephone Company of Pennsylvania
The Chesapeake and Potomac Telephone Company
The Chesapeake and Potomac Telephone Company of Maryland
The Chesapeake and Potomac Telephone Company of Virginia
The Chesapeake and Potomac Telephone Company of West Virginia

The Diamond State Telephone Company
Indiana Bell Telephone Company, Incorporated
Michigan Bell Telephone Company
The Mountain States Telephone and Telegraph Company
New England Telephone and Telegraph Company
New Jersey Bell Telephone Company
New York Telephone Company
Northwestern Bell Telephone Company
The Ohio Bell Telephone Company
Pacific Northwest Bell Telephone Company
The Pacific Telephone and Telegraph Company
Bell Telephone Company of Nevada
South Central Bell Telephone Company
Southern Bell Telephone and Telegraph Company
The Southern New England Telephone Company
Southwestern Bell Telephone Company
Wisconsin Telephone Company
Board of Public Utilities of New Jersey
Louisiana Public Service Commission

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on June 18, 1984.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit issued June 18, 1984 is reported at 737 F. 2d 388 (4th Cir. 1984). The Public Utilities Commission of Ohio and the Office of Consumers' Counsel were both intervenors in the decision below and parties to the original Federal Communications Commission proceeding.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered judgment on June 18, 1984. Rehearing was denied on October 3, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

I. STATEMENT OF THE CASE

A. STATUTORY PROVISIONS

At issue in this proceeding are several provisions of the Communications Act of 1934. The Act was enacted "for the purpose of regulating interstate. . .communication by wire . . .so as to make available. . .a rapid, efficient, nation-wide. . .wire and radio communication service. . . ." 47 U.S.C. § 151 (1962). To this end, Congress created the Federal Communications Commission and provided the Commission with jurisdiction necessary to enforce the provisions of the Act. *Id.*

In establishing the Federal Communications Commission (Commission) Congress expressly limited its jurisdiction in order to preserve the traditional right of the states to exercise their sovereign police power authority over purely intrastate matters. Specifically, Congress mandated that "nothing in this chapter shall be construed to apply or to give to the Commission jurisdiction with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." 47 U.S.C. § 152(b), (Supp. 1984). Section 220 of the Communications Act of 1934 requires the Commission to prescribe depreciation rates for carriers subject to the interstate jurisdiction of the Commission. 47 U.S.C. § 220(b) (1962).

B. THE NATURE OF THE CONTROVERSY

The focus of the present controversy is the implicit tension between the Commission's statutory authority to regulate the interstate aspects of the telecommunications industry and the several states statutory and constitutional rights to regulate the intrastate affairs of local telephone companies. The Commission has sought through its pre-emption order to set depreciation rates and charges for intrastate telecommunications service, an area expressly reserved to the states by the Communications Act. *Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies*, 92 F.C.C. 2d 864 (1983). The controversy arose in the context of the depreciation methodology to be used by telephone companies for the purpose of determining the cost of telephone service to consumers.

By depreciating the cost of capital assets, telephone companies are able to pass on to consumers the cost investment in equipment. Just as a private, non-regulated industry would add its depreciation costs to the price charged for its products, a telephone company must reflect consumer service charges in its depreciation expenses in order to recover its capital costs. Thus, the accounting methodology used to determine the rate at which a telephone company may recoup its depreciation costs is an inherent component of the ratemaking process.

Consistent with the purpose of the Communications Act, Congress has directed the Federal Communications Commission to prescribe the depreciation methodology and rates by which telephone companies operating interstate may recover depreciation costs for equipment used for interstate communication. 47 U.S.C. § 220(b) (1962). Likewise, Congress has recognized and preserved the traditional police power of the several States to prescribe the depreciation methodology and rates by which telephone companies may recover depreciation costs for equipment used solely for intrastate communication. 47 U.S.C. §§ 152(b), 221 (b) (1962 & Supp. 1984). Thus, for over fifty years the telecommunications industry has conformed the recovery of depreciation costs to both state and federal regulation, depending on the nature and use of the equipment depreciated.[1]

C. THE DECISIONS OF THE FEDERAL COMMUNICATIONS COMMISSION

In 1982 the Commission scrutinized the legality and efficacy of the existing dual system of state and federal regulation regarding depreciation methodology for telephone

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[1]The Commission acknowledged that a preemption decision would require repudiation of "nearly forty years of administrative practice and applicable state court precedents by adopting an interpretation of Section 220 that would require an unwilling state commission to follow all accounting and depreciation methods prescribed by this Commission." *Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies*, 89 F.C.C. 2d 1094, 1107. (1982).

companies. *Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies*, 89 F.C.C. 2d 1094 (1982). After exhaustively analyzing the language and history of the Communications Act, the Commission held that the states have a right to regulate depreciation rates for the purpose of intrastate ratemaking. *Id.* at 1107.

The Commission reasoned that because no Congressional intent to preempt state regulatory authority could be gleaned from the language or history of the Communications Act, preemption could only be justified if the state regulation frustrated the Commission's "statutory objective with respect to interstate and foreign communications." *Id.* at 1108. The Commission concluded that the scheme of federal regulation would not be frustrated by such legitimate state regulatory objectives, and that it, therefore, had no statutory authority to preempt state regulation. *Id.*

In 1983, acting upon a Petition for Reconsideration, the Commission recanted its earlier preemption analysis, finding that the language and history of the Communications Act mandates preemption of state regulation as a matter of law. *Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies*, 92 F.C.C. 2d 864 (1983).[2] The Commission further found that even if preemption could not be justified by reference to Congressional intent, it had the authority to preempt because there was a possibility that state regulation of depreciation methodology could frustrate the federal scheme of regulation. *Id.* at 877.

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[2]The Commission's preemption decision has spawned a plethora of litigation at both the state and federal level. *Cincinnati Bell Telephone Co. v. Public Utilities Commission of Ohio*, 12 Ohio St. 3rd 280 (1984), *appeal filed* 53 U.S.L.W. 3424 (October 16, 1984); *New England Telephone Co. v. Public Utilities Commission of Maine*, 570 F. Supp. 1558 (D. Me. 1983) *rev'd.* 742 F. 2d 1 (1st Cir. 1984); *New England Telephone and Telegraph Co. v. Public Service Board of Vermont*, 567 F. Supp. 490 (D. Vt. 1984) *appeal pending* No. 84-7051 (2nd Cir.); *Chesapeake and Potomac Telephone Co. of Maryland v. Maryland Public Service Commission*, 560 F. Supp. 844 (D. Md. 1983), *aff'd.* No. 83-1403 (4th Cir. November 20, 1984); *South Central Bell Telephone Co. v. Louisiana Public Service Commission*, 557 F. Supp. 227 (M.D. La. 1983), *aff'd.* 744 F.2d 1107 (5th Cir. 1984), *petition for cert. filed*, Case No. 84-870 (November 30, 1984); *Northwest Bell Telephone Co. v. Washington Utilities and Transportation Commission*, 565 F. Supp. 17 (W.D. Wash. 1983), *appeal pending* No. 83-3746 (9th Cir.); *Southwest Bell Telephone Co. v. Arkansas Public Service Commission* 738 F.2d 901 (8th Cir. 1984), *cert. pending* No. 84-483.

It is important to note that in neither of its preemption decisions did the Commission conduct hearings, receive testimony, or examine empirical evidence regarding the relationship of state and federal regulation of depreciation methodology.

D. THE DECISION OF THE LOWER COURT

The Commission's preemption decision was promptly appealed by numerous state utility commissions. In 1984 the Fourth Circuit Court of Appeals addressed the constitutionality of the Commission's preemption order and found the preemption to be valid. *Virginia State Corporation Commission v. Federal Communication Commission*, 737 F. 2d 388 (4th Cir. 1984).[3] In applying its constitutional analysis, the court acknowledged that the Communications Act expressly reserved to the several states the right to prescribe rates for intrastate telecommunications service, an important and substantial component of which is depreciation expense. *Id.* at 392. The court found it unnecessary, however, to decide whether state regulation could be preempted as a matter of law under the language of the *Act. Id.*

Rather, the court focused upon the relationship between the federal and state regulatory policies. *Id.* at 392-93. In this regard, it noted that it would not be physically impossible to contemporaneously enforce both the state and federal regulatory schemes — "presumably, the carriers could keep accounts in which assets would be separately depreciated for intrastate and interstate purposes." *Id.* at 396.

Nonetheless, the court found that so long as the Commission had "meant to preempt," the constitutionality of such preemption was to be determined with reference to "whether such preemptive action was within the scope of the agency's authority." *Id.* at 393.

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[3]There are presently two petitions for certiorari pending from the Fourth Circuit decision. *Louisiana Public Service Commission v. Federal Communications Commission*, No. 84-871 (filed November 30, 1984); *State of California, et al. v. Federal Communications Commission*, No. 84-889 (filed December 10, 1984).

The court found that the Commission had the statutory authority under Section 220(b) of the Act to prescribe classes of property and percentages to be allowed as depreciation. *Id.* at 393. Accordingly, the court held that the Commission had the authority to preempt state regulation due to its statutory authority to prescribe classes of property subject to federal interstate depreciation regulation. *Id.*

In addition, the court found that the Commission had the authority to preempt because the enforcement of state depreciation regulation frustrated the "rapid development of interstate facilities." *Id.* at 396. This conclusion was based on the court's speculation that seventy-five percent of all investment in new telephone equipment falls within the intrastate services category. *Id.* at 395. Thus, according to the court, "[i]f that large amount of equipment should fail properly to reflect its true, rapid depreciation, interstate service would then suffer the effect of delayed innovation." *Id.* at 395.

II. REASONS FOR GRANTING THE WRIT

THE CONSTITUTION OF THE UNITED STATES AND THE COMMUNICATIONS ACT OF 1934 DO NOT PERMIT THE FEDERAL COMMUNICATIONS COMMISSION TO PREEMPT THE TRADITIONAL AUTHORITY OF THE SEVERAL STATES TO REGULATE THE DEPRECIATION METHODOLOGY USED FOR THE PURPOSE OF INTRASTATE RATEMAKING.

A. THE DECISION OF THE LOWER COURT IS CONTRADICTORY TO THE PRIOR DECISIONS OF THIS COURT.

Although federal preemption of state regulation is ultimately a question to be resolved under the Supremacy Clause of the United States Constitution, an analysis of preemption issues must nevertheless depend primarily upon statutory rather than constitutional interpretation. As this Court has repeatedly held, "[t]he first inquiry is whether Congress, pursuant to its power to regulate commerce, U.S.C., Art. 1, § 8,

has prohibited state regulation of the particular aspects of commerce involved." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

This Court has consistently directed that in determining the constitutionality of federal preemption in a field traditionally occupied by the states "we start with the assumption that the historic police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). "This assumption provides assurance that 'the federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones v. Rath Packing Co.*, 430 U.S. at 525 *(quoting United States v. Bass*, 404 U.S. 336, 349 (1971)).

Of course, when Congress has "unmistakably ordained" that a federal statute was enacted to exclusively regulate a part of commerce, conflicting state laws must succumb. *Jones v. Rath Packing Co.*, 430 U.S. at 525; *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963). "This result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. at 525.

The decisions of this Court have clearly established that the test for determining whether state and federal laws are so irreconcilable that the state law must succumb is "to determine whether, under the circumstances of [the] particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (citations omitted).

Even a cursory perusal of the lower court's decision reveals that the court did not follow the constitutional preemption analysis as set down by this Court. In fact, the lower court went so far as to create a presumption that any Commission decision to preempt state regulation will be valid.

1. The lower court erred in failing to consider the language and history of the Communications Act of 1934.

The lower court found it unnecessary to consider the language and legislative history of the Communications Act. Instead, the court simply conceded that Congress had intended the Act to preserve the states' traditional police power over intrastate concerns. 737 F. 2d at 392-93. The court's decision ignores that intention. As an alternative to considering the express intent of Congress as controlling, the lower court read a provision of the Act out of context to find that the Commission had the statutory authority to preempt. *Id.* at 394. This analysis was not only a misapplication of the constitutional test for preemption under the precedent of this Court, it was an obvious misreading of the Act.

In *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), this Court unequivocally held that where Congress has legislated in a field traditionally occupied by the states, the reviewing court should assume that the historic police powers of the States were not to be superceded "unless that was the clear and manifest purpose of Congress." This Court then reasoned that Congressional intent, if not evidenced by the language and history of the Act, might be derived from 1) the pervasive nature of the federal statute, 2) the predominance of the federal interest over the subject matter of the statute, 3) the character of obligations imposed by the federal statute, or, 4) a direct conflict between the federal and state laws. *Id.*

The lower court misconstrued this analysis. It found that the clear intent of Congress was to preserve the states' police power over intrastate ratemaking, according to the plain language of Section 152(b) of the Act. 737 F.2d at 392. Having found an express Congressional intent to strictly limit the Commission's preemptive authority, however, the lower court looked further to the other criterion set out in *Rice* for the determination of Congressional intent. 737 F.2d at 392-93. Thus, the court sought to subvert an express congressional directive manifested by Sections 152(b) and 221(b) of the Act,

with its own judicially defined idea of Congressional intent.[4] Principally, the lower court determined that the specific and express intent of the Congress as stated in Section 152(b) was displaced by the "statutory backdrop that places primary emphasis upon a 'rapid, efficient, nationwide, and world-wide' communications service."[5] 737 F.2d at 392-93.

Having apparently reached the awkward conclusion that the regulatory scheme evidenced a predominant federal interest despite the language of the Act to the contrary, the lower court then misapplied the test announced by this Court in *Fidelity Federal Savings & Loan Co. v. de la Cuesta*, 458 U.S. 141 (1982). Thus, under the lower court's preemption analysis, *any* indication of Congressional intent to preempt, no matter how obtuse, will justify the deprivation of the traditional police power of the states, even in the face of specific statutory language to the contrary.

2. The lower court erred in finding that the Federal Communications Commission had the statutory authority to preempt state regulation of intrastate ratemaking.

Although the lower court cited *de la Cuesta* and its progenitors with approval,[6] it disregarded the language and holding of the decision.

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[4]In the words of the lower court:

> While it is true that the Act does reserve to the states the authority to prescribe rates for intrastate telephone service that reservation is not to be read as preserving the states' sphere of intrastate jurisdiction at the expense of an efficient, viable interstate telecommunications network.

737 F.2d at 392.

[5]The lower court was apparently referring to the general purposes of the Act, expressed in Section 151 that its enactment was:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, effective, nation-wide, and world-wide wire radio communication service with adequate facilities at reasonable charges. . . .

[6]737 F.2d at 393.

In *de la Cuesta* this Court merely reaffirmed its long-standing preemption analysis. 458 U.S. at 152-53. Accordingly, it was held that congressional intent is the determinant factor in deciding whether or not to apply the preemption doctrine. *Id.* The Court reasoned that if congressional intent is indiscernible from the language of the federal statute, then, and only then, should a reviewing court look to the scheme of the federal regulation. *Id.* It is simply incongruous to suggest that the *de la Cuesta* decision lends credence to the notion that a reviewing court should attempt to find further congressional intent after having satisfied the threshold criterion of the preemption test by finding in the language of the statute an explicit congressional intent not to preempt a particular area of traditional state control. This Court has never postulated that a specific and express congressional intent should be superceded by a judicially defined scheme of regulation or "statutory backdrop."

Indeed the *de la Cuesta* decision did not so hold. The import of *de la Cuesta* was that preemption could be inferred from extraneous sources if the language of the statute was uncertain of congressional intent. *Id.* at 152-53. Thus, the *de la Cuesta* decision directed that when the federal statute indicates only that "Congress has directed an administrator to exercise his judgment, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily." 458 U.S. at 153-54. In this instance Congress did not direct the Commission to exercise its judgment as to whether the states should be permitted to regulate matters pertaining to intrastate ratemaking. In fact, Congress not only specifically prohibited the Commission from exercising jurisidiction over intrastate ratemaking regulations,[7] it directed the Commission to report any

[7]Although the Commission's jurisdiction is expressly limited under Sections 152 and 220 of the Act, further confirmation of Congress' intent to preserve state regulatory authority is found by reference to the legislative history of the Act. For example, Senator Dill, the Senate manager of the bill, remarked during the debates which preceeded passage of the Act that:

> We have attempted, in this proposed legislation, to safeguard State regulation by certain provisions to the effect that where existing intrastate telephone business is being regulated by a State commission, the provisions of the bill shall not apply.

78 Cong. Rec. 8823 (1934).

need for further legislation necessary to reconcile state and federal regulation. 47 U.S.C. §220(j) (1962).

In Section 220(j) of the Act, Congress expressly reserved any future decisions on preemption of state intrastate ratemaking regulations to itself. The lower court disregarded the mandate of Section 220(j) that "[t]he Commission shall investigate and report to Congress as to the need for legislation to define further or harmonize the powers of the Commission and of the State commissions with respect to matters to which this section relates." 47 U.S.C. §220(j) (1962). Congress could hardly have more clearly articulated the limits of the Commission's discretion under the Act than by requiring the Commission to report the need for further legislation if state and federal regulation conflict.

After misapplying the *de la Cuesta* test and disregarding express congressional intent not to preempt intrastate ratemaking regulations, the lower court read Section 220(b) of the Communications Act out of context to summarily conclude that the Commission had been granted broad preemptive authority over intrastate ratemaking regulations. 737 F. 2d at 394. The court took scant notice of the fact that in so construing Section 220(b) it had subverted what it had previously found to be a clear Congressional intent to preserve state regulatory authority over intrastate ratemaking.[8]

Section 220 of the Act states that "[t]he commission may, in its discretion, prescribe the forms of any and all accounts,

[8]After citing the provisions of the Act expressly preserving state regulatory authority over depreciation methodology pertaining to intrastate ratemaking, the court obliquely stated that:

> Nonetheless, the foregoing provisions are rendered against a statutory backdrop that places primary emphasis upon a "rapid, efficient, Nationwide, and worldwide" communication service. Given that overriding concern, the 1983 Opinion by the FCC construing the account and wiring orders of 1980 and 1981 is most reasonably interpreted as [a] valid exercise of statutory authority by the FCC, preempting inconsistent state action by virtue of the Supremacy Clause.

737 F.2d at 392-393,.

records, and memoranda to be kept by carriers subject to this chapter. . . ." 47 U.S.C. §220(a) (1962). Under the definitional preface that the statute is applicable only to "carriers subject to this chapter," Section 220(b) goes on to direct the Commission to "prescribe for *such carriers* the classes of property for which depreciation charges may be properly included under operating expense. . . ." 47 U.S.C. §220(b) (1962) (emphasis added). Throughout Section 220(b) the Commission is directed to regulate depreciation methodology for "such carriers," in reference to the provision in Section 220(a) that the provisions of Section 220 shall only apply to carriers "subject to this chapter." 47 U.S.C. §§220(a), (b) (1962).

Under the title "Application of Chapter," Section 152(a) provides that "[t]he provisions of this chapter shall apply to all *interstate and foreign communications* of wire. . . ." Thus, the entire chapter, including the provisions of Section 220 apply to carriers to the extent that such carriers are engaging in "interstate and foreign communications."

Section 152(b) expressly limits this affirmative grant of statutory authority:

> *Nothing in this chapter* shall be construed to apply or to give the Commission jurisdiction with respect to charges, classifications, practices, services, facilities, *or regulations for or in connection with intrastate communication service by wire or radio of any carrier.*

47 U.S.C. § 152(b) (Supp. 1984) (emphasis added).

Therefore, by the unequivocal language of the statute, Section 220(b) regulates only the interstate communications of carriers engaging in interstate communication. It is an outright contradiction of Section 152 to suggest that Section 220 applies to the entirely intrastate operations of carriers engaging in both intrastate and interstate communications.

3. The lower court erred in finding that the federal scheme of regulation under the Communications Act was frustrated by state regulation of depreciation methodology solely for intrastate ratemaking purposes.

To further compound its error, the lower court found that preemptive authority was also conferred upon the Commission due to a supposed conflict between the state and federal regulations. 737 F.2d at 393. This Court has held, however, that even if an apparent conflict exists between state and federal regulations, preemption will not be imposed in the face of express congressional intent to the contrary. *Pacific Gas Electric Co. v. State Energy Resources Conservation & Development Comm'n.*, 103 S.Ct. 1713 (1983); *Silkwood v. Kerr-McGee Corp.*, 104 S.Ct. 615 (1984).

In analogous situations, this Court has held that where Congress has expressed a clear intention not to preempt a particular field of traditional state control, any conflict between state and federal regulations must be resolved in favor of upholding the state law so long as there exists a non-conflicting rationale for the state law. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 103 S.Ct. at 1727-28.

For example, in *Pacific Gas*, this Court began its preemption analysis by noting that the express language of the federal statute preserved state regulatory authority in a particular field of traditional state control. *Id.* at 1229-30. The Court then reasoned that so long as the state regulation fell within the area of statutorily protected state control, preemption could not be justified. *Id.* at 1730-32. This conclusion was found to be inevitable, for it was beyond the imagination of this Court that Congress would have both preserved state regulatory authority over a particular field, and, at the same time, legislated comprehensively so as to entirely preempt the field so as to create a regulatory vacuum. *Id.* at 767.

This Court found, therefore, that so long as the purpose of the state regulation fell within the field reserved to the states under the federal statute, an apparent conflict in the state and federal regulatory schemes would not suffice to indicate a congressional intent to preempt the state law. *Id.* The Court recognized the inability of the judiciary to intervene where

Congress had deemed it provident to tolerate some tension between state and federal regulation.[9]

Had the lower court applied the holdings and rationale of the *Pacific Gas* and *Silkwood* cases, it would have necessarily concluded that the Communications Act exhibits a clear congressional intent to comprehensively regulate interstate communications and at the same time preserve the states' traditional control of intrastate ratemaking regulation.[10] The specific limits on the Commission's jurisdiction under the Act belie any notion that Congress was unaware that most telephone companies handle both intrastate and interstate communications, which creates an implicit tension between state and federal regulation.[11] The lower court should have concluded, therefore, that Congress intended to tolerate such regulatory tension. Any other conclusion must adopt the implausible idea that Congress meant to create a regulatory vacuum regarding depreciation methodology by affirmatively granting control to the states over intrastate ratemaking and strictly limiting the Commission's jurisdiction to interstate communications.

Congress specifically reserved to the states the authority to regulate intrastate telecommunications services, and the lower court so found. Yet, the lower court also affirmed

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[9]Finding an express congressional intent to deny preemptive authority, the Court announced the role of the judiciary:

> Given this statutory scheme, it is for Congress to rethink the division of regulatory authority in light of its possible exercise by the states to undercut a federal objective. The courts should not assume the role which our system assigns to Congress.

103 S. Ct. at 1732.

[10]The lower court specifically noted that ". . . the Act does reserve to the states the authority to prescribe rates for instrastate telephone service . . . ." 737 F.2d at 392. Specifically, Section 152(b) of the Act reserves to the States intrastate rate regulation, a significant part of which is depreciation of telephone equipment used solely for intrastate communication.

[11]The concept of dual regulation is not a new concept, but rather is common in the field of utility regulation. For example, Section 1 of the Natural Gas Act (NGA) establishes dual regulation reserving to the states regulation of "direct sales for consumptive use. . . ." *Panhandle Eastern Pipeline Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 517 (1947).

preemption of state regulation, clearly within the reserved area, intrastate ratemaking, in direct conflict with *Pacific Gas.*[12]

B. THE DECISION OF THE LOWER COURT RAISES IMPORTANT QUESTIONS OF CONSTITUTIONAL LAW HICH SHOULD BE SETTLED BY THIS COURT.

The decision of the lower court, if not overturned, leads to three inevitable results. First, it will instill federal administrative agencies with unbounded discretion to preempt traditional areas of state regulation in spite of clear congressional directives to the contrary. Second, it will authorize the Federal Communications Commission to eradicate all state control of intrastate ratemaking. Third, it will allow the federal judiciary to act in concert with a federal agency to destroy state sovereignty guaranteed by the United States Constitution and federal statutes.

1. The decision of the lower court sanctions federal preemption whenever there exists a possibility that state and federal regulations may conflict.

It is significant that neither the Federal Communications Commission nor the lower court was able to base its preemption decision on empirical evidence that there was an actual conflict between the state and federal regulatory schemes. In this regard, both the Commission and the lower court found that state regulation of intrastate ratemaking was

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[12]By upholding preemption, the Fourth Circuit overturned the clear distinction between interstate ratemaking and intrastate ratemaking, as originally recognized in *North Carolina Utilities Commission v. FCC*, 537 F.2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976) and *North Carolina Utilities Commission v. FCC*, 552 F.2d 1036 (4th Cir. 1977), *cert. denied*, 434 U.S. 874 (1977). *Virginia State Corporation Commission v. FCC*, 737 F. 2d at 396-397 (Widener J. dissenting).

preemptible because it could have an effect on the federal scheme of interstate regulation under the Communications Act.[13]

Notwithstanding the fact that in this instance the Commission had no discretion to preempt state regulation, the lower court was bound to defer to administrative discretion only to the extent that the administrative decision was "reasonable," and was one which "Congress would have sanctioned." *de la Cuesta*, 456 U.S. at 675. Thus, this Court has consistently held that administrative decisions must not be "unreasonable, unauthorized, or inconsistent with" the underlying statute. *United States v. Shimer*, 367 U.S. 374, 381-82 (1961); *Ridgway v. Ridgway*, 454 U.S. 46, 57 (1981).

The preemption order of the Commission was manifestly unreasonable because it was not based upon any empirical evidence of an actual conflict between the state and federal regulatory schemes. Rather, the Commission found only that:

> In light of the concerns expressed about an efficiently functioning market, we must find that inconsistent depreciation rates prescribed by state commissions will interfere with the efficient operation of the communications marketplace.

92 F.C.C. 2d at 880. Clearly, the Commission sought no empirical evidence of regulatory frustration but instead relied upon the "concerns expressed" by self-interested telephone

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[13]According to the Commission:

> For all of these reasons, it is apparent to us that a substantial impact on federal policies could result if state commissions were allowed to diverge from Commission prescribed depreciation rates and practices.

92 F.C.C. 2d at 878. According to the lower court:

> Indeed, the conduct and development of interstate communications would undoubtedly be affected by the states' imposition of depreciation policies that slowed capital recovery and innovation.

737 F. 2d at 395.

companies which stood to gain monetarily if state regulations were displaced.[14]

The decision of the Commission was "unauthorized" because under the Communications Act the Commission has no discretion to preempt intrastate ratemaking regulations. 47 U.S.C. §§ 152(b), 221(b) (Supp. 1984). The clear language of the Act permits no other conclusion.

Most importantly, the decision of the Commission as affirmed by the lower court is obviously inconsistent with the Communications Act. *Id.* There need be no guesswork about whether Congress would have sanctioned federal preemption of the state's intrastate ratemaking actions in setting depreciation rates. Congress expressly refused to sanction such preemption in the language of the Act. 47 U.S.C. § 152(b) (Supp. 1984). Moreover, Congress specifically reserved to itself the authority to preempt intrastate ratemaking by directing the Commission to report any need for further legislation to reconcile state and federal regulations. 47 U.S.C. § 220(j) (1962).

The lower court, however, disregarded the standard of review for administrative decisions and accepted wholesale the unreasonable and unlawful findings of the Commission.[15] It is not enough for a reviewing federal court to base a Constitutional preemption decision on an administrative agency's meaningless recitation of a possible future conflict.

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[14]According to the Commission's preemption decision:

> GTE of Ohio has indicated that it will be denied $7 million in capital recovery this year if the State of Ohio's disparate depreciation treatment is allowed to prevail.

92 F.C.C. 2d at 884-85 (Separate Statement of Commissioner J. Fogarty).

[15]In the light of the Commission's contradictory opinions on the question of its authority to preempt, the "final" decision by the Commission is not one entitled to deference by any court. Such deference is only appropriate where "an agency has rendered binding, consistent, official interpretations of its statute over a long period of time." *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 41 n. 27 (1977). A non-contemporaneous interpretation that contradicts an agency's earlier position "does not fare well under these standards." *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-142 (1976). In the instant case the Commission in less than a year found that it could not (would not) reverse 40 years of prior administrative and judicial precedent 89 FCC 2d at 1107, and then did reverse its prior ruling. 92 F.C.C. 2d 864.

Had Congress desired this result, it could have easily delivered complete discretion into the hands of the Commission. Instead, Congress enacted the Communications Act, and provided for the coexistence of state and federal regulatory authority with full realization that there is an implicit tension between the two. The lower court and the Commission have shown a total disregard for the congressionally created separation on the theory that the dual regulation may create a conflict, not upon the actual showing of any conflict.

2. THE LOWER COURT'S DECISION PERMITS PREEMPTION OF EVERY ASPECT OF INTRASTATE RATEMAKING REGULATION.

If state regulation of depreciation methodology for intrastate ratemaking purposes is deemed to be inconsistent with the objectives of federal regulation under the Communications Act, then by extension, every aspect of intrastate ratemaking may be considered to be similarly inconsistent with federal regulation of interstate communications. The language and structure of the Communications Act do not permit such a result.

For example, as is the case with depreciation of telephone equipment used for interstate communications, the Commission also prescribes the rate of return, rate base, and operating expense for interstate carriers under the Communications Act. The rate base used for interstate ratemaking is derived in part from the same assets used to determine intrastate rates.[16] Because rate base is affected by both state and federal regulations, there must always exist some possibility that the state and federal regulatory schemes will have an impact upon each other. Thus, armed with the decision of the lower court, the Commission would have unbridled discretion to preempt any aspect of intrastate ratemaking

[16]It is only through the separations process in many instances that telephone equipment is allocated between the interstate and intrastate jurisdictions.

under the rationale that since every aspect of ratemaking is regulated simultaneously by federal and state law, there is always a possibility of conflict. Followed to its ultimate conclusion, *Virginia State Corporation Commission,* enables the FCC to usurp all functions of intrastate ratemaking. For example, under the rationale followed by the FCC and the Fourth Circuit, the disallowance of any expense item could conceivably result in a conflict between federal and state policy justifying preemption.

3. The lower court erred in supplanting its policy judgment for the clear directive of Congress.

What the lower court believes to be the wisest division of regulatory authority between state and federal law is irrelevant. The court was bound to enforce the provisions of the Communications Act and abide by the division of regulatory authority established by Congress. Cloaking judicial legislation in "general purpose" language of a statute by no means renders the decision less arbitrary or more democratic. Absent firm underpinnings, the lower court's ill-founded opinion that state regulation of intrastate ratemaking "poses an impediment to rapid development of interstate facilities" cannot be viewed as a sufficient justification for encroaching upon state sovereignty in so arbitrary a manner.

CONCLUSION

It is manifest that this court accept jurisdiction over this dispute, or suffer fifty years of state regulatory authority and the clear intention of Congress to be vanquished by administrative fiat, with the imprimatur of a lower federal court.

Petitioners respectfully submit, therefore, that this petition for certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

ROBERT S. TONGREN
Assistant Attorney General
Counsel of Record

MARTIN J. MARZ
MARY R. BRANDT
Assistant Attorneys General

WILLIAM A. SPRATLEY
Consumers' Counsel

RICHARD P. ROSENBERRY
JANINE L. MIGDEN
LAWRENCE E. BARTH

Office of the Ohio Attorney General
Public Utilities Section
180 East Broad Street
Columbus, Ohio 43215
Telephone (614) 466-4396

Attorneys for Petitioner
The Public Utilities Commission of Ohio